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Towards a Constitution for European Citizens?

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Introduction

Estonia stands at the doorstep of the European Union. Being one of the future Member States lots of discussion and debate has been going on about what the European Union really is and where it is headed in the future. After studying more deeply the law of the European Community one definitely understands that it is quite difficult to answer the question mentioned above in few words. If one still tries to do that, the answer usually remains at a very superficial level. The European Community has been characterized by the observers as everything from a European superstate to a qualified free-trade association. The former President of the Commission Jacques Delors has successfully described it as “an unidentified political object”¹. It clearly reflects the sharp disagreement between different points of views and approaches. Although that being true, all observers are at one in saying that the European Community today takes decisions in areas that are of central importance both for states and for individuals, and thereby exercises a significant degree of state power². It seems that, although there are different perspectives and points of views, the main goal still remains the individual person and its happiness and welfare³.

The debate about the EC and its future lies in principle on two main lines. In other words a special kind of a two-fold logic hangs above the Community⁴. On one side are those who believe that the EC is a grouping of sovereign nation states for the purposes of international cooperation under public international law. According to that view it is up to Member States to guarantee the protection of their citizens. On the other side are those who believe that the EC is a new and independent political society with individual rights stemming from the common Constitution and protected by it.

¹ Where is the European Union Heading? By Jacques Delors Former President European Commission, US Speaking Tour, 26 March 4 April 2001, available:

<http://www.eurounion.org/news/speeches/2001/DelorsEUFutureSp.pdf>

² Ola Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community. KFS Lund AB, 2002, p I

³ That could be seen in the Preamble as well as in Article 2 of the Treaty establishing the European Community and Article 6 of the Treaty on European Union

⁴ Charles Leben, Federation of nation states or a Federal State?, Jean Monnet Workin Paper No 7/00, Harvard Law School, 2000, p 2

Thus, the purpose of the current thesis is to study and understand where do these two totally different kinds of approaches come from, how they have developed through the case law of the European Court of Justice and in what shape they might eventually result.

The examination of political philosophy questions relating to the Community, particularly political obligation, may be likened to an underwater search with the aid of a hydrophone. The worst one can do is to start near the surface, because the more or less random noise generated there makes it impossible to pick up more distant patterns of sound⁵. It means that in order to understand the origin of that dual perspective one needs to start in digging deeper and turning to the basic teachings and theories of political philosophy. That is why the thesis first turns his face towards the works of two great English philosophers Thomas Hobbes and John Locke and takes a small trip into the history. The importance of those philosophers rests on the fact that their philosophical works are not limited to the field of law but extend to the foundations of the social and humanist sciences, such as the theory of knowledge, psychology, economics, religion, anthropology and sociology, in which they have also exercised a lasting influence⁶. On the basis and in the light of those theories, that is to say philosophical roots, one can better understand the ongoing processes in the debate about the Community and its future, which includes the welfare of its citizens.

Since those two main lines of arguments that were mentioned above, or that two-fold logic, correspond mainly to the works of Locke and Hobbes, a relatively big amount of attention has been given to their works and thoughts in this thesis. In addition to that a great emphasis has been put to the book “A Europe of the Member States or of the Citizens. Two philosophical perspectives on sovereignty and rights in the European Community” by Ola Zetterquist. This has mainly resulted from the fact that we lack a full-scale attempt to consider the Community from a basic moral philosophy perspective taking its point of departure in the political philosophy view of the relation between the

⁵ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p XI

⁶ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p V

individual and the state power⁷. The book mentioned above has been of major help in understanding the perspectives of Locke and Hobbes.

Besides historical and philosophical sources the thesis also reaches for the works, which try to analyze the current situation in the light of the case law of the European Court of Justice in relevant fields. Mention must be made to authors such as Joseph Weiler, Frederico Mancini and Trevor Hartley. When it comes to the future developments and discussions within the framework of the future Convention, one has to use the research done by the relevant working groups of the Convention. Exploiting the materials as guides in order to analyze the situation from different angles an attempt is made to write the thesis by using the historic as well as systematizing method.

The first part of the thesis deals briefly with the history of ideas behind the two different points of departure, namely the theory of sovereignty by Hobbes and the theory of no sovereignty by Locke. A minor emphasis has also been put to the theory of state in the renaissance.

The second part concentrates on the reflections of the theories studied in the first part in the present Community. In other words the thesis analyses the perspectives from the part of the European Court of Justice and from the part of the Member States and tries to find a philosophical origin of relevant argumentations. Member State perspective represents mainly the approach according to which the Community constitutes an international organization consisted of sovereign states and deriving its source of validity and legitimacy from the public international law, particularly the constitutions of the Contracting States. In the same time the ECJ, representing the other perspective, has been very active in trying to show the Member States that the Community, once being an ordinary international organization, has mutated into an independent political society with its own constitution, the Treaty, from which it derives its legitimacy and by what are protected the rights of the individuals.

The last part of the thesis is dedicated to the present debate about the future of the Community within the framework of the future Convention. The main aim of the Convention was to give a solution to or at least reduce the differences between the points of departure mentioned above; in other words to conclude a constitution for the European

⁷ Zetterquist, p X

Union. Since the discussions are still in the ongoing and developing phase, the thesis only briefly touches upon the background of the Convention and introduces and analyses some relevant outcomes that have already been achieved.

1. Historical background of modern constitutional theories

1.1. Introduction

In order to talk about the future, one has to in the first place turn back to the history and analyze it⁸. The importance of the past is obviously highlighted by most of the academics and observers. The role of the past should not be undermined in any case if one does not want to start to reinvent the wheel over and over again. For political philosophers the history has served as both an example and a warning. By studying the lessons of history present observers can better draw conclusions about solutions to the political problems of present times. One of the clearest advocates of such an approach was Machiavelli, who systematically based his views about the political problems of the Renaissance on the experience of ancient Rome⁹. It means that historical experience could best be used as a starting-point for one's own arguments.

Thus, in order to reach the deeper levels of the discussion about some of the core constitutional questions of the Community, this part of the thesis lays down the historical foundation of the perspectives considered.

The history of Western thinking on constitutional questions goes far back to classical Rome and Athens but finds its main focus and point of departure in the Age of Enlightenment. In other words the significance of the classical era has remained primarily politico-historical whereas in the same time that cannot be said about the Renaissance. During the Renaissance there emerged theories that are clear, albeit incomplete, precursors of the ideas of the Enlightenment¹⁰. In that sense mention must be made about Machiavelli's theory of the state and its welfare, as well as about Bodin's theory of sovereignty.

In that connection it is also important that this thesis briefly deals with the theory of the state in the Renaissance before entering the philosophical world of the Enlightenment with Thomas Hobbes and John Locke as main representatives. After a brief overview about theories that emerged during the Renaissance, this part of the thesis goes further

⁸ Professor Dave Allen's lecture about the future of European Common Foreign and Security Policy in Lund University, 23.12.2003

⁹ O.Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 37

¹⁰ *ibid*, p 37

into studying the respective theories of Hobbes and Locke, particularly the theory of sovereignty and the theory of no sovereignty (also known as the theory of constitutionalism). As was already said before, the contemporary sphere of constitutional law owes its origin mainly to those two great philosophers. Although they take common elements, such as individuals in the case of society and natural laws and social contract in the case of the state of nature, to start from, they manage to draw totally different conclusions. The themes that unite Hobbes and Locke are central to the modern secularized state. They can be said to be questions of the division, and unity of, the state and law, and the form of the relations between government and the governed, particularly as regards what rights are to be accorded to individuals¹¹. Thomas Hobbes and John Locke are the first modern theorists of the state. No analysis of the concept of sovereignty or the concept of democracy (rule of law and protection of fundamental rights of individuals as examples) could be complete without studying the respective theories of Hobbes and Locke. That is why their theories have been chosen in the thesis as the main points of departure for later discussion.

1.2. The theory of the state in the Renaissance

1.2.1. The theory of the state

The fall of the Roman Republic effectively marked the end of the popularly legitimized state with an independent legal order, the purpose of which, at least to some extent, included protection of the rights of individual citizens¹². Before the emergence of the Renaissance in northern Italy during the 15th century there was a time of temporal power with close connection with the ecclesiastical one. It means that the temporal power, precisely like the Church, came of God. Or to put it in other words the State and the Church were two sides of one and the same coin. This kind of a symbiosis between those two has also been illustrated with an understanding of the temporal power acting as God's extended arm. Nevertheless, the re-emergence of interest in ancient Greek and

¹¹ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 52

¹² O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 39

Roman culture, which had based on secularized ideas, led to an abandonment of the symbiosis mentioned above. As a result the individuals regained their status as political objects.

The theory of the state is considered to be the greatest innovation in constitutional theory during the Renaissance. The new theory particularly emphasized the institutions, which today are ordinarily connected with the state and which can be said to stand at the center of the theory of the state of later ages¹³. Two authors of major importance during the 16th century are Machiavelli (1469-1527) and Jean Bodin (1529-1596).

Machiavelli put forward the interest of the state and its effective government as the overarching political question¹⁴. It quite obviously reflects the absence of both biblical and metaphysical arguments in order to legitimize his own theory. Machiavelli regarded the state as constituting an organic structure governed by its own laws and he has therefore sometimes been called the first theorist of the state¹⁵. According to Machiavelli the interest of the state was of that importance that it could legitimize the monarch's acts contrary to the law. A close parallel could here be drawn with Hobbes' respective theory in that field.

For both Machiavelli and Bodin the exercise of government was made notably more effective by the creation of an institutional system¹⁶. It resulted in the separation of judiciary from the monarch. The judicial function was therefore entrusted to independent officials as well as institutions. It seems perfectly right to conclude that the constitutional institutions of present time have their origin in the search for a more effective and more flexible government and not primarily in the protection of civic rights against the state.

¹³ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 41

¹⁴ John Kelly, A Short History of Western Legal Theory, p 172

¹⁵ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 41

¹⁶ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 43

1.2.2. The concept of sovereignty

According to the theories emerged during the Renaissance, the concept of sovereignty was of major importance. Without sovereignty no state could exist at all. Sovereignty was first defined by Bodin as the ultimate power to enact general laws in relation to one and all¹⁷. Sovereignty, according to Bodin, was not conditioned by the consent of anyone else.

Sovereignty consists of two qualities: external and internal. According to the latter sovereignty applies to the ultimate power of command. Externally, on the other hand, sovereignty has independence from alien power. Sovereignty could not be divided among institutions, because Bodin represents an idea of a continually ruling sovereign, which means that the sovereign cannot be regarded as being a state as such, or a certain norm, but must be likened to a certain institution within the state¹⁸. It means that the place where sovereignty is located determines the form of government.

Although the Sovereign could put himself above the law, he had certain limits, the first of which were the laws of nature and God. Sovereign also had to obey the state's "royal laws", that is to say, laws that regulate the structure of the state as such¹⁹. It means that the identity and sovereignty of the state must, so to speak, remain intact so that they can be transmitted to the next sovereign²⁰. Therefore the "royal laws" could be compared with a modern constitution when it comes to the foundation of the state. In addition to the limits mentioned above, the Sovereign was also obliged to respect the property of its subjects. That obligation is connected with the Sovereign's right to raise taxes only with the consent of Parliament²¹.

The intention to lay down limits for the Sovereign derives mainly from the wish to make the sovereign power as efficient as possible. It can be said to constitute a precursor

¹⁷ Jean Bodin, *On Sovereignty*, ed. Julian Franklin, Cambridge University Press, I:10, p 56 § 491

¹⁸ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 44

¹⁹ J.Bodin, *On Sovereignty*, I:8, § 361 p 13 and § 389 p 34

²⁰ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 46

²¹ J.Bodin, *On Sovereignty*, I:8, § 372 p 21

to the doctrine of power-sharing in the Age of Enlightenment²². The consequences of Renaissance theories of sovereignty can be felt even today. It has led to complaints and arguments about encroachments on national sovereignty, particularly when it comes to the theories of power-sharing. A classical example of that conflict is the courts right of judicial review or the case of dividing sovereignty between different states²³. It is quite obvious that the theory of sovereignty has complicated rather than simplified constitutional analysis of modern phenomena such as for example the European Community.

1.3. The theory of sovereignty

1.3.1. The state of nature and Social Contract

According to Hobbes model of society is based on the idea of man in a state of nature. In his perspective the State of nature is the state that obtains when men interact in the absence of a superior power, which can regulate this interaction and ensure, by force, that it takes place in accordance with given rules²⁴. According to Hobbes the state of nature is a state of war and it constitutes the ultimate evil. It does not mean only open hostilities but also the latent threat of conflict represented by men's opposing interests when there is no power to which all individuals are subordinate. Therefore the State of Nature could be characterized with the existence of total freedom. It means basically that man can do as he wishes without any hindrance from anyone else. Or in the other words everyone has the right to everything²⁵.

Physical insecurity and fear are thus the main elements in the state of nature. It results in the instinct that dominates throughout the state of nature, namely self-

²² Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 47

²³ O.Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 50

²⁴ Thomas Hobbes, "*De Cive*" and "*De Homine*", from *Man and Citizens*, ed. B. Gert, Hackett Publishing, 1991, ch I, p 116f, § 10

²⁵ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 74

preservation. Self-preservation constitutes man's chief motive force²⁶, which determines his actions.

Since in a state of nature men are equal, no individual man can lay claim, based on the concepts of natural law, to rule over others²⁷. But, according to Hobbes, equality leads to a state of war among men. Hobbes identifies three causes of the state of war in the state of nature. These are competition for scarce resources, uncertainty as regards the aims of others and ambition and vanity.

In order to escape the constant insecurity, regarding the aims of those around them, men therefore associate together in political societies by mean of a Social Contract²⁸. Men who associate with each other become the members of the society created. In other words they constitute the demos of that society²⁹. Aim of the demos is to leave the state of nature in order to safeguard their security. It is when and only when all individuals transfer the freedom existing in the state of nature to the common sovereign, that society is created. The Social Contract becomes therefore the result of mens instinct of self-preservation.

1.3.2. The Sovereign

Hobbes rejects the Aristotelian idea of political society as something naturally inherent in man³⁰. That comes from the understanding that civil society is not a thing of nature but the creation of man. It arises through a contract among equals and therefore constitutes a phenomenon that cannot be found in nature.

Hobbes compared political society, which he termed Leviathan, with an artificial man³¹. According to that construction the sovereign is not the head as one might assume but instead the artificial soul. The soul guarantees the life and motion of that "body". The

²⁶ T. Hobbes, *De Cive*, ch I, p 115, § 7

²⁷ T. Hobbes, *Leviathan*, ed. Richard Tuck, Cambridge University Press, 1996 ch XIII, p 86f

²⁸ T. Hobbes, *Leviathan*, ch XVII, p 117

²⁹ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 77

³⁰ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 78

³¹ T. Hobbes, *Leviathan*, Introduction, p 9

will, in Hobbes` view, materializes in the law. The people are also part of that artificial man, whose actions are the actions of all. The spirit of revolt and civil war are compared with sickness and death in the common body of the state.

The political society characterizes the relation between the security afforded by the sovereign and political obedience to him by the citizens. It derives straightly from the aim of the political society, namely to guarantee men`s security. Therefore security is necessary for the legitimacy of society. The way security can best be achieved is only through total subordination to the sovereign³². It means that the total freedom existing in the state of nature should be abandoned and instead vested in the sovereign. People can give up their natural freedom and the state can be established only if the sovereign is loyal to his promises. The protection offered by the sovereign includes both protection against internal and external enemies. The sovereign also regulates the relations between men by means of civil law, which thereby eliminates the insecurity of the state of nature that follows from the fact that all have a right to all.

The definition of sovereignty according to Hobbes is the competence to enact laws³³. The legislative competence in its turn presupposes the sovereign`s possession of the means of coercion to ensure the effectiveness of the law. If a sovereign lacks of physical power citizens have instead the possibility of choosing a new sovereign by a comparable process. According to that definition sovereignty is exercised through legislation and not through naked force. Force constitutes a necessary guarantee of and prerequisite for, but it is not the same as the legislative power as such³⁴.

One of the main elements of Hobbes` theory is the unity of the legal system. In normal circumstances, that is to say when the sovereign is in control of his territory and its habitants, an alien legal system can have validity on a sovereign territory only if the sovereign is content to tolerate the situation. The validity of all rules of law can thus be derived only from the sovereign irrespective of who has promulgated them.

³²O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 80

³³ T. Hobbes, Leviathan, ch XVIII, p 125

³⁴ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 84

1.3.3. The law and the judiciary

There was mentioned before about individuals right of self-preservation. It must be understood as the individual's liberty to defend his own person and not as a law, which binds the other inhabitants in the state of nature³⁵. Rights that others must observe, such as the right of property, cannot exist independently of a public legal order, backed up by means of enforcement.

The concept of law in Hobbes must be seen in the framework of principle of equity. It is a general principle of equality, which means the right to equality before the law among all legal persons³⁶. It is so central, that the sovereign's intention must always be presumed to be equity. Equity is the artificial reason that governs the body of society that has been created. Exactly as in the case of other natural laws it is ultimately the sovereign, either as legislator or as judge, who decides what shall be regarded as compatible with equity³⁷.

The purpose of law according to Hobbes is to direct people and keep them in such motion as not to hurt themselves³⁸. It also reflects the obligation of the sovereign to keep the people safe, to protect them against others as well as against themselves. As we saw earlier in the thesis that is why individuals conclude the Social Contract, create a society and give up their ultimate freedom. If the laws fail to keep the people in such motion as not to hurt themselves, men end up back in the state of nature again from where they desperately tried to escape.

Judiciary in Hobbes is not an independent power but part of the sovereign's attributes³⁹. It is an attribute, which must be of help while fulfilling the obligation to protect the citizens and guarantee their security. According to Hobbes, an arbiter is an impartial person whom the parties to a dispute appoint to resolve it⁴⁰. The arbiter must therefore have no personal interest in the case, either before or after the resolution of the dispute. It is also quite obvious that it is not allowed according to Hobbes for the

³⁵ T. Hobbes, *Leviathan*, ch XIV, p 91

³⁶ T. Hobbes, *Leviathan*, ch XXX, p 237

³⁷ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 88

³⁸ T. Hobbes, *Leviathan*, ch XXX, p 239

³⁹ T. Hobbes, *Leviathan*, ch XVIII, p 125

⁴⁰ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 94

contending parties to conclude an agreement with the arbiter. That would ruin the exercise of the principle of equity, because an arbiter, like the sovereign, is bound by the natural law on equity, which he therefore must never breach while executing his task.

Law created by other means than commands of the sovereign, for example by custom or case-law, has binding effects only when the sovereign has given his approval. By that kind of *ex post* approval the sovereign steps into the place of the originator of the law. This perspective is of major importance because it totally rejects the doctrine on common law. Hobbes was of thinking that in the long run that leads to the breakdown of the society⁴¹. Judges who, under the cloak of their legal expertise, placed themselves above the sovereign thereby laid the foundation for civil war, and that they were in principle no more than “a most inexpert mob”⁴².

1.4. The theory of no sovereignty

1.4.1. The state of nature in Locke

John Locke, representing the methodological individualism, similar to Hobbes, finds the point of departure for observation of men in his theory in the so-called state of nature⁴³. This state of nature is founded on the principle of equality of man. In Hobbes it corresponds to everybody’s right to everything. Locke defines the state of nature as being the absence of a common legislator and a common impartial judge⁴⁴. Locke does not think that the state of nature is a state of war between men. According to Locke a state of war is just an unjustified coercion. Rulers who ignore the common judge and place themselves above the law by force or by the threat of force thereby also put themselves in a state of war with the governed⁴⁵.

Locke is of the view that the state of nature contains a binding law. Locke’s fundamental norm can be summarized in the thesis: *man being to be preserved*, as much

⁴¹ T. Hobbes, *Leviathan*, ch XXIX, p 224

⁴² Thomas Hobbes, *De Homine*, ch XIII, p 67, § 6

⁴³ John Locke, *Two Treatises of Government*, ed. Peter Laslett, Cambridge University Press, 1989, II, p 269, § 4

⁴⁴ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 98

⁴⁵ J. Locke, *Two Treatises*, II, p 412, § 222

as possible⁴⁶. The natural law system was according to him instituted by God during the creation. It is something, which man with the aid of reason can subscribe to. From the fundamental norm about the preservation of mankind follow a number of other laws. They are also natural laws in the sense that their validity is not dependent on the state. The law as a consequence of the equality of man is that no one shall harm another as to his life, health, liberty or property⁴⁷. Therefore it is evident that both in the state of nature as well as in the civil society men have rights against one another. Those rights precede the formation of the state. Men have rights as individual persons and not simply as the members and beneficiaries in political society. In the state of nature all individuals have two rights: the right to interpret natural law and the right to implement it. Implementation of the natural law must be understood as the right to punish those who break the law. The fact that those rights include the interpretation and implementation makes them judicial in nature.

1.4.2. The doctrine of property

Locke's well known doctrine on property is of great importance to an understanding of the theory of rights in the state of nature⁴⁸. The concept of property includes all inalienable rights of persons, except the right to life and liberty. Therefore, the starting point for this concept is the individual person. When the individual person, through work, blends with an object it is incorporated into his legal domain and a property right arises⁴⁹.

Property helps men to remain independent. In other words property is a derivative on man's right to self-government, that is to say man's right to independence⁵⁰. The absence of property creates a subordinate relation between individuals and that makes them dependent on others. By giving men rights through their work they gain also security against the exposure that was present in the state of nature. Thus property functions in

⁴⁶ J. Locke, *Two Treatises*, II, p 278f, § 16

⁴⁷ J. Locke, *Two Treatises*, II, p 271, § 7

⁴⁸ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 101

⁴⁹ J. Locke, *Two Treatises*, II, p 288, § 27

⁵⁰ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 103

Locke as the state does in Hobbes. It helps men to escape the state of nature and guarantee their safety. For Hobbes it is the state, which makes man a moral being, whereas in Locke it is thus property and reason, which makes man a morally conscious individual⁵¹.

As we saw earlier, in state of nature everybody has the right to interpret and implement the law of nature. That means that there would be as many different interpretations as there are persons. In addition to that everybody could implement his interpretation according to his arbitrary will. The threat resulting from this kind of a situation is obvious. Therefore in order to guarantee the homogenous interpretation and implementation of the law of nature, it is necessary to place the respective right in the hands of an impartial instance. It is thus, in addition to legislative power, the judicial power, which constitutes political society's most important function⁵².

1.4.3. Self-government

According to Locke, no man is born into a political state of obedience. It is only with their own consent that men become members of political society and in that way acquire the rights and obligations that follow from this membership⁵³. This argument is the cornerstone of Locke's theory of society. It means that men create a society with a certain reason and purpose in order to escape the state of nature. The purpose of society according to Locke is to safeguard already existing rights and not, as in Hobbes, to make it possible for them to come into existence in the first place. In accordance with the consent of the people limits to political authority must be established. That in its turn lies therefore at the center of constitutionalism.

The society with its purpose to safeguard already existing rights gives its members, that is to say the people, certain security that their rights will always be protected. The essence of the concept "security" can be said to lie in the idea of self-government, which

⁵¹ *ibid*, p 103

⁵² O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 106

⁵³ J. Locke, *Two Treatises*, II, p 346, § 119

in turn is closely related to property⁵⁴. By self-government is meant that no man should need to be dependent on the arbitrary goodwill of others for his survival, since such a relationship will lead to a state of obedience between individuals⁵⁵. As was already said before, the idea of self-government is closely connected to the right to property. Property helps to keep men away of being subordinate to others, safe-guard their possibility of self-government and in the end guarantees them their independence. Self-government and the right to acquire property on the other hand imply also a negative obligation. Particularly the obligation of not to exclude another man from the opportunity to acquire property⁵⁶. That right is given to the whole of mankind and corresponds therefore with the mentioned obligation to respect it.

1.4.4. The Lockean Constitution

An individual becomes a member of a given society only on the basis of his own consent and becomes thereby part of this demos. The Social Contract concluded between the men creates the society. According to Locke it consists of two separate contracts, namely the contract of society and the contract of government⁵⁷. The first of those builds a society by a unanimous decision of the men. With that contract men give away their right to interpret and implement the law of nature and lay down the principles according to which the division of state power is determined. The contract of government creates the common judge and the common legislator, that is to say the government. With that contract the men decide who is to interpret and enforce the law.

Establishing limits to the political authority lies at the center of constitutionalism. Government, whether in the form of the state or in some other form, constitutes a potentially greater threat to the rights of the individual than infringements by other individuals. The rights of individuals being the common good must be protected and may

⁵⁴ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 107

⁵⁵ John Simmons, The Lockean Theory of Rights, Princeton University Press, 1992, p 274

⁵⁶ John Simmons, The Lockean Theory of Rights, p 274

⁵⁷ Ola Zetterquist, the lecture on Fundamental Questions of Sovereignty and the Legitimacy in the Constitution of EU at Lund University, 2003

not be infringed for the good of the state⁵⁸. That is why it is necessary for government to be made subordinate to the law common to all. Only in that way can the protection of the rights of individuals be ensured.

Government as a delegated power is based on the trust of people. This fundamental principle is binding also on the legislature and must be reflected in the first fundamental positive law – the constitution⁵⁹. The constitution makes subordinate the government as well as the legislator⁶⁰. In that way it constitutes the last resort for people in protecting their rights against the state. But in the same time the constitution must guarantee them the protection against encroachments from other individuals as well. The constitution is a means of safe-guarding the possibility of self-government. The protection of every mans right and property is ensured by drawing a boundary in the form of a constitution and an impartial judge with competence to determine conflicts⁶¹.

Thus, according to constitutionalist view it is the people who are the authors and the source of the constitution. It means that constitution must be able to be derived from the people, that is to say citizens collectively, who constitute society's ultimate power. It is from that source that all constitutional institutions derive their authority. No inferior power an alter it⁶².

1.4.5. Institutional power-sharing

The concentration of power is always potentially dangerous. To safeguard the moral rights of individuals, political power must always be distributed among different organs, particularly among various assemblies⁶³. In other words legislation and the implementation of the law must be carried out by different instances. Being otherwise human frailty might tempt the legislator to exempt himself from his own laws and that

⁵⁸ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 108

⁵⁹ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community., p 119

⁶⁰ Nowadays the constitution is the collection of written principles that indentify sources and restraints of the public power.

⁶¹ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 110

⁶² J. Locke, Two Treatises, II, p 373, § 157

could in the end jeopardize the original purpose of the society, which was to protect individual rights. Society's objective of safeguarding natural rights is achieved by defining the Law of Nature in a law adopted by the legislative power and binding on all⁶⁴.

Even though the legislative power is divided among different hands, it is not unlimited in its scope. It can never be sovereign as it was in Hobbes. The rulers, who include the legislature, have a trusteeship role, accorded to them with the contract of government. The position of trusteeship limits the legislator to act only for the common good and for the preservation of mankind. In other words the legislator is bound to its obligation to safeguard citizens' rights. As we saw before in the equality of men in the state of nature no one can give another more or better rights than he or she possesses. That means that no one can transfer the right to injure another man as to his life, liberty or other rights to the legislative power, because he has never had this right. The legislative power may therefore not deprive anyone of his property without his consent, either direct or via elected representatives⁶⁵. In addition to that, principle of the rule of law must be observed. This concept typically consists of three important elements: first, it excludes arbitrary law or even the exercise of discretionary authority; secondly it includes the equality of all before the law; and thirdly it means that constitutional law is not the cause but the consequence of man's rights⁶⁶. All those three elements figure very strongly also in Lockean theory⁶⁷. It could even be argued that Locke with its strong emphasis on the rule of law presupposes the existence of legal remedies. Surprisingly it is nowhere clearly and unambiguously stated in "Two Treatises" that courts or judges are to have authority to rule over any constitutional legal disputes. This might be explained with highly sceptic views, which were commonly acknowledged by most of the philosophers of that time, towards the judicial corps and lawyers⁶⁸

⁶³ J. Locke, *Two Treatises*, II, p 329, § 94

⁶⁴ J. Locke, *Two Treatises*, II, p 326, § 90

⁶⁵ J. Locke, *Two Treatises*, p 360, § 138

⁶⁶ Albert Dicey, *The Law of the Constitution*, Indianapolis: Liberty Fund, 1982, p 120

⁶⁷ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 121

⁶⁸ O. Zetterquist, *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, p 125

2. Citizens of the European Union within the process of constitutionalisation

2.1. Introduction

Professional observers must have noticed that since the beginning of the Community there have, within the process of deeper integration, constantly emerged so called “constitutionalising elements”⁶⁹. Contrary to the “conservatory elements”, which preserve the original position of Member States, the constitutionalising elements have given lots of reasons to discuss about the nature of the Community. The central question in that discussion has been whether the Member States have remained sovereign and do they still constitute the source of legitimacy of the Community. Or whether it is the citizens of the Union, with their rights stemming directly from the constitution of the Community, who are the source of the Community’s legitimacy. It must be said that this difference originates mainly in two perspectives towards the legal bases of the Community. The first of those takes the public international law as the legal bases of the Community whereas the other one the constitutional law.

The major actor in introducing new features to the Community legal order under the constitutional law perspective has been the European Court of Justice. Due to its “wild” activity in that field it has received huge amount of heavy criticism from the part of the Member States but also from numerous legal scholars. The well-known “battle” between the Community, that is to say the Court, and the Member States has lasted basically since the beginning of the integration process and it is worth mentioning that it continues to do so. The winners of that “war” should in any way be the individuals whose rights must not be left unprotected.

In order to add a small portion into that discussion on its own the thesis analyzes the situation from both angles and tries to shed some light to major points of disagreement. Therefore this part concentrates to the action of the Court of Justice and to the respective counter attack to that action from the part of some Member States.

⁶⁹ Alan Dashwood, “States in the European Union, *European Law Review*, 1998, p 201

2.2. The “Constitutional charter” of the European Community in the case-law of the European Court of Justice - a development towards a new and independent political society?

“Our sovereignty has been taken away by the European Court of Justice. It has made decisions impinging on our statute of law and says that we are to obey its decisions instead of our own statute law. ... The European Court has held that all European directives are binding within each of the European countries; and must be enforced by national courts; even though they are contrary to our national law. ... No longer is European law and incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all.”⁷⁰

If one were asked to synthesize the direction in which the case law produced in Luxembourg has moved since 1957, one would have to say that it coincides with the making of a constitution for Europe⁷¹. The term “constitution” generally rings a bell that there must be something to do with a state. European Community, although displaying unique institutional structure and unprecedented law making and judicial powers, lacks some major features necessary for a state. First and most important of all: the instrument that gave rise to the Community was a traditional multilateral international treaty.

Treaties are basically different from the constitutions, although they could also be called constitutions⁷². The Treaty, contrary to an ordinary constitution of a state, does not safeguard the fundamental rights of the individuals affected by its application. Therefore from the formal viewpoint, Community law belongs to international law. Nonetheless, Community law can be distinguished from traditional public international law in its content, its instruments and its sources of law⁷³. From the viewpoint of its content,

⁷⁰ A. Denning, *The European Court of Justice: Judges or Policy Makers?*, London: Bruges Group, 1990

⁷¹ Frederico Mancini, “The making of Constitution for Europe”, *Common Market Law Review*, 1989, p 595

⁷² Magnificent example is the International Labour Organisation (ILO), which was created in 1919 by the adoption of a “constitution” and is still governed by it.

⁷³ P.J.G. Kapteyn and P. VerLoren van Themaat, edited by L.W.Gormley, *Introduction to the Law of the European Communities*, Kluwer Law International, 1998, p 77

instruments and sources of law Community law is a common internal law in the Member States rather than a law between these states⁷⁴.

In addition to that, compared with classic international organisations, the EU institutions have special characteristics. The Council may vote by qualified majority and take decisions, which are binding on the Member States without any need for transposition. The Commission is independent from the Member States and has a near-exclusive right of initiating legislation. The European Parliament is directly elected and shares with the Council a real right of co-decision for a large part of legislation and for the budget. The Court of Justice is independent and its decisions are binding on the Member States.

A vital place in the functioning of the Community has been accorded to the latter legal element, namely the European Court of Justice⁷⁵. This is something, which does not tend to be the case in traditional international organizations. The Court has used this opportunity in an effective manner in order to give legal support and direction to the process of integration. Thus, the main endeavour of the Court of Justice has been to “constitutionalise” the Treaty, that is to fashion a constitutional framework for a federal-type structure in Europe⁷⁶. The constitutionalism thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court, a “constitutional charter” governed by a form of constitutional law⁷⁷. The first time the Court spelled out that claim was in the the case *Les Verts*⁷⁸ and since then it has repeatedly confirmed that in several occasions.

When one tries to find a philosophical root to that perspective, he should turn to Locke and his theory of constitutionalism according to which the protection of individual rights is the main objective of the political society. That means that in Court`s point of

⁷⁴ Lagrange, Adv. Gen. In Case 8/55 *Fédération Charbonnière de Belgique v. High Authority* (1954-1956) ECR 245 at 277 who spoke of the Treaty as being the charter of the Community, since the rules of law which derive from it constitute the internal law of the Community.

⁷⁵ P.J.G. Kapteyn and P. VerLoren van Themaat, edited by L.W.Gormley, Introduction to the Law of the European Communities, Kluwer Law International, 1998, p 288

⁷⁶ F. Mancini, “The making of Constitution for Europe”, p 596

⁷⁷ J. Weiler, The Constitution of Europe, “Do the new clothes have an emperor?” and other essays on European integration, Cambridge University Press, 1999, p 221

⁷⁸ Case 294/83 (1986) ECR 1339 at 1365

view individual rights must be protected not only by the Member States but also by the Community. That could only be achieved by “constitutionalising” the Treaty which was already mentioned above⁷⁹.

But why is the constitution so important for the Community? When turning to Locke the answer is that it is necessary for the protection of the rights of individuals. This approach has also found expression in the case law of the ECJ, particularly in the Opinion of the Advocate-General in the case *Internationale Handelsgesellschaft*. That opinion formulates the principle of the protection of the rights of individuals as one of the most fundamental in EC law:

“The fundamental principles of national legal systems contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual.”⁸⁰

The results achieved by the Court are more than just worth mentioning. Further down below major elements of constitutionalism, which have occurred in the *acquis communautaire* due to the Court’s active jurisprudence, are studied. We will see how they constitutionalise the Treaty, which is based on the rule of law, establishes a new legal order distinct from national laws and protects human rights and fundamental freedoms. In other words they claim to lay down the foundation for a constitution of the Community, which determines the common legislator and the common judge in the meaning of John Locke’s philosophy. These elements also reflect the perspective according to which the Community finds its legal bases in the constitutional but not in the public international law.

⁷⁹ Mancini doubts in his article whether the Court was always inspired by a clear and consistent philosophy.

⁸⁰ Case 11/70, *Internationale Handelsgesellschaft*, ECR (1970) 1125 at 1146

2.2.1. The doctrine of direct effect

The judicial doctrine of direct effect was introduced by the ECJ in 1963⁸¹ and since then it has developed subsequently. The doctrine provides the following presumption: Community legal norms that are clear, precise, and self-sufficient⁸² must be regarded as the law of the land in the sphere of application of Community law⁸³. In other words they can be applied by the national courts. Direct effect applies to all actions producing legal effects in the Community: the Treaty itself and secondary legislation. The latter possibility was not first stipulated in the *Van Gend en Loos*. The case mentioned was just a starting point for future developments. Eleven years later the Court took in *Van Duyn v Home office*⁸⁴ a further step forward by attributing direct effect to provisions of Directives not transposed into the laws of the Member States within the prescribed time limit, so long as they met the conditions laid down in *Van Gend en Loos*.

From the philosophical perspective this achievement fulfills one of the main elements of political society in Locke, namely the common legislator whose acts must be applicable throughout the society. It seems that the idea behind the Court's argumentation is that European citizens are part of one and the same political society and that the relationships between them, the Community and the Member States are of a constitutional and not an international law nature.

A more practical approach would argue that this doctrine is essentially concerned with assuring respect for the rule of law. It was confirmed later by the Court itself, when it stated, that "the Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."⁸⁵ In other words, the main purpose of the Court was to ensure that neither level of government could rely upon its malfeasance – the Member State's failure to comply, the Community's failure or even inability to enforce compliance, with a view to

⁸¹ *Van Gend en Loos*, Case 26/62, (1963), ECR 1.

⁸² It means that they do not require further legislative measures by the authorities of the Community or the Member States.

⁸³ J. Weiler, *The Constitution of Europe*, p 19

⁸⁴ Case 41/74, (1974), ECR. 1337

⁸⁵ Case 294/83 (1986) ECR 1339 at 1365

frustrating the legitimate expectation of the Community citizens on whom the Directive confers rights⁸⁶. The rule of law is perhaps the most fundamental of constitutional guarantees, because all other values depend on it, for them to be upheld at all.

Whatever the reasoning behind the doctrine, the main goal strives obviously to protect better the rights of individuals at the level of Community. The doctrine of direct effect is the basis for making the individuals direct legal persons at the Community level. Bearing that in mind, it could be understood that the more far reaching purpose of introducing the doctrine mentioned above was that the states should not function as intermediaries except only as concerns the factual implementation of the Community's legal rules.

2.2.2. The doctrine of supremacy

It was noted above that the Community was founded by an ordinary international agreement between the states. Such kinds of treaties do not usually enjoy higher law status with regard to the internal constitutions of the contracting parties. When one looks at the Treaty, the same seems to apply in the case of the European Community as well. That is so, because the Treaty fails to state squarely whether Community law is pre-eminent *vis-à-vis* prior and subsequent Member State law. As was seen above in the doctrine of direct effect, there can be no question of the transformation doctrine applying in the field of Community law. The Court also rejected the most important consequence of that doctrine, which results in the principle of supremacy⁸⁷.

It is not a surprise any more that the Community law is supreme and therefore above the laws of the Member States⁸⁸. According to Mancini the now undisputed existence of a supremacy clause in the Community framework is a product of judicial creativeness⁸⁹. The Court in *Costa v ENEL* ruled that:

⁸⁶ F. Mancini, "The making of a constitution for Europe", p 602

⁸⁷ P.J.G. Kapteyn and P. VerLoren van Themaat, edited by L.W.Gormley, Introduction to the Law of the European Communities, Kluwer Law International, 1998, p 85

⁸⁸ The principle of supremacy was introduced in the Case 6/64, *Costa v ENEL* (1964), E.C.R. 585

“by creating a Community of unlimited duration, having its own institutions, its own personality ... and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights ... and have thus created a body of law, which binds both their nationals and themselves”⁹⁰.

The argument behind the concept is obvious. Some scholars have mentioned that the alternative to the supremacy clause would have been a rapid erosion of the Community, a possibility that nobody really envisaged⁹¹. Although that might be true, the recognition of Community pre-eminence was not only an indispensable development; it was also a logical development. It is self-evident that in a federal or quasi-federal context the issue of supremacy will arise only if federal norms are to apply directly, that is to bear upon the federation’s citizens without any need of intervention by the Member States. Thus, *Costa v ENEL* could even be regarded as a sequel of *Van Gend en Loos*. It means that the full impact of direct effect is realized in combination with the second “constitutionalising” doctrine, the one of supremacy. Or in other words, in light of supremacy, the full significance of direct effect becomes transparent⁹². The combination of the two doctrines means that Community norms that produce direct effects are not merely the law of the land, but also the “higher law” of the land.

As we found out in the first part of the thesis, according to Locke, the reason why people escape from the state of nature is to better protect their fundamental rights. By concluding the contract of society they create certain channels of trust between the ones who govern and themselves. As was already said the doctrine of direct effect guarantees the law common to all in the Community. The doctrine of supremacy in its turn acts like a double protection by creating a hierarchy in this system of law common to all. Therefore the common interpretation of the law is achieved and possible collisions could be avoided. The Community in that way helps to reduce the uncertainty, which was immanent in the Lockean state of nature.

⁸⁹ F. Mancini, “The making of a constitution for Europe”, p 599

⁹⁰ Case 6/64, (1964) E.C.R. 593

⁹¹ According to Kapteyn and VerLoren van Themaat *the Court in Costa v ENEL demonstrated that the essence of the common market stands or falls by ensuring a uniform effect of the relevant rules of Community law in every Member State.*, p 85

⁹² J. Weiler, *The Constitution of Europe*, p 21

2.2.3. The doctrine of implied powers

When creating both the direct effect and supremacy of the Community law the European Court of Justice emphasized the need to make the Community efficient. Efficiency helps to perform the tasks entrusted to it by the Treaty, that means indirectly by the citizens. In order to perform these tasks the question about specific powers granted to the Community arises. Direct effect and supremacy will not serve their functions if the Community does not have the necessary instruments at its disposal⁹³. The issue, in which this consideration came to the fore, in 1970, was the treaty-making power of the Community. The full realization of many EC internal policies, which are of great importance when fulfilling its obligations, clearly depend on the ability of the Community to negotiate and conclude international treaties with third parties.

Since the Treaty itself was rather sparing in granting the Community treaty-making power, limiting it to a few specified cases, the Court of Justice saw its duty to amend this situation on its own. In its landmark decision of that period the European Court held that the grant of internal competence must be read as implying an external treaty-making power⁹⁴. The Court added also that Community international agreements would be binding not only on the Community as such, but also, as appropriate, on and within the Member States. The significance of this judgment does not conclude only with the treaty-making power. A very important constitutional element in that case is that powers would be implied in favor of the Community where they were necessary to serve legitimate ends pursued by it.

The doctrine of implied powers is closely connected with the principle of pre-emption, which was also developed by the Court of Justice in 1970s. This principle plays a major role in allocation of power and it is an essential complement of the supremacy doctrine since it determines whether a whole policy area has been actually or potentially occupied by the central authority so as to influence the intervention of the Member States

⁹³ J. Weiler, *The Constitution of Europe*, p 22

⁹⁴ Case 22/70, *Commission of the European Communities v Council of the European Communities* (1971) ECR 263 (“ERTA” case)

in that area⁹⁵. A great example from the case law of the Court is the case *Commission v United Kingdom*⁹⁶.

2.2.4. The doctrine of human rights

The Treaty contains no Bill of Rights and there is no explicit provision for judicial review of an alleged violation of human rights. It seems that in the same way as they ignored the issue of citizenship, the framers of the Rome Treaty did not envisage the need to protect human rights. There might be several reasons behind that consideration. Judge Mancini proposes two of them⁹⁷. First, according to Mancini, presumably the framers of the Rome Treaty knew that bills of rights are in the long run a powerful vehicle of integration and in 1957, when the European climate was already tinged with skepticism, they were not eager to see the integration process speeded up by a central authority empowered to safeguard the civil liberties of the Community citizens first in Brussels and later, perhaps, in the six countries concerned. But on the other hand there is a further possibility: the founding fathers may have thought that the scope of Community law was essentially limited to economic issues and as such, did not involve human rights problems.

Whatever the reasons might have been behind the fact that there is no bill of rights in the Treaty, the founding fathers could not prevent that issue from popping up in a very trenchant way. Within the process of later integration the Community law came to govern diverse and sometimes unforeseen facets of human activity. In reality it started to encroach upon a whole gamut of old and new rights with both an economic and a strictly civil content. Thus, a problem, which in 1957 might have appeared to be of practical insignificance, turned ten years later into one of the most controversial questions of Community law.

⁹⁵ F. Mancini, "The making of a constitution for Europe", p 603

⁹⁶ Case 804/79 (1981) ECR 1045

⁹⁷ F. Mancini, "The making of a constitution for Europe", p 608-609

In a much discussed line of cases starting in 1969⁹⁸, the Court asserted that it would, none the less, review Community measures for any violation of fundamental human rights, adopting for its criteria the constitutional traditions common to the Member States and the international human-rights conventions to which the Member States subscribed. The Court confirmed that fundamental human rights were enshrined in the general principles of Community law and were protected by the Court. The principal message was that the arrogation of power to the Community implicit in the other three doctrines that were mentioned above would not be left unchecked. Community norms, at times derived only from an implied grant of power, often directly effective, and always supreme, would be subjected to a human-rights scrutiny by the Court⁹⁹. In other words, in doing so the Court took a view consistent with its case law on general principles of Community law, which already offered guarantees affecting the sphere of human rights. This was underlined in the celebrated judgment in Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*¹⁰⁰ when the Court, noting that respect for fundamental human rights formed an integral part of the general principles of law protected by the Court of Justice, indicated that whilst the protection of such rights was inspired by the constitutional traditions common to the Member States, it had to be ensured within the framework of the structure and objectives of the Community¹⁰¹. The Court went a step further in the second *Nold* judgment¹⁰², noting that it flowed from the inspiration from the constitutional traditions of the Member States that the Court could not uphold measures, which were incompatible with fundamental rights recognized and protected by the constitutions of those states. Few years after *Nold* judgment the Court in *Hauer* held, that:

“fundamental rights form an integral part of the general principles of law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures, which are incompatible with the fundamental rights

⁹⁸ Case 29/69 *Stauder v. City of Ulm*, (1969) ECR 419 at 425

⁹⁹ J. Weiler, “The Constitution of Europe”, p 24

¹⁰⁰ (1970) ECR 1125 at 1134

¹⁰¹ P.J.G. Kapteyn and P. VerLoren van Themaat, edited by L.W.Gormley, Introduction to the Law of the European Communities, p 283

recognized by the constitutions of those States are unacceptable in the Community”.¹⁰³

The Court followed this up by awarding compensation for damages on the basis of Article 288 of the Treaty, in cases where there had been a breach of “a general and superior principle of Community law for the protection of the individual” and “the Community legislature manifestly and gravely disregarded the limits of its discretionary power, thereby committing a sufficiently serious breach of a superior rule of law”.¹⁰⁴

Although there is no list of human rights in the European Treaties, Article 6(2) of the Treaty on European Union states, that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”¹⁰⁵. Therefore the Court frequently refers to that Convention in order to uphold the rights and freedoms mentioned in the Convention and its subsequent Protocols. In December 1998, the Court of Justice even ruled that the Court of First Instance of the EC had breached the right to a fair hearing mentioned in Article 6 of the Convention, by taking too long to give judgment in an anti-trust case¹⁰⁶. However, the Community is not party to the European Convention on Human Rights, and there has always been the risk that the Court of Human Rights in Strasbourg would find certain provisions of Community law to be incompatible with the Convention¹⁰⁷. Although that risk is according to some observers largely theoretical¹⁰⁸, in February 1999, the Court of Human Rights handed down a very important judgment in the case of *Matthews v United*

¹⁰² Case 4/73, *J. Nold Kohlen- und Baustoffgrosshandlung v. Commission* (1974) ECR 491 at 507-508

¹⁰³ Case 44/79 *Liselotte Hauer v Rheinland-Pfalz* (1979) ECR 3727 at 3744-3745

¹⁰⁴ Joined Cases C-104/89 & C-37/90, *Mulder and Heinemann* (1992) ECR I-3061 at 3132

¹⁰⁵ OJ C 325 of 24 December 2002

¹⁰⁶ Case C-185/95 P, *Baustahlgewebe GmbH v Commission of the European Communities*, (1998) ECR I-8417

¹⁰⁷ The question about the Community joining the Convention on Human Rights will be dealt later in the thesis.

¹⁰⁸ J.-C. Piris, Does the European Union have a Constitution? Does it need one? *European Law Review*, 1999, p 557-585

Kingdom, by ruling that an act of primary Community law was incompatible with Protocol No 1 to the Human Rights Convention¹⁰⁹.

When the Court supports its arguments with the structure and objectives of the Community it is obvious that the latter could be compared in the Court's eyes with a political society similar to Locke's. In that consideration the Court acts like a common and impartial judge in the Community to which the citizens have delegated their trust in order to get protection.

This kind of jurisprudence is obviously a clear indication of creativeness of the Court when interpreting the Treaty. Professor Weiler even compares the European Court with a constitutional court. According to him the human-rights jurisprudence has the hallmarks of the deepest jurists' prudence¹¹⁰. The success of the European Court's bold moves with regard to the doctrines of direct effect, supremacy, implied powers, and human rights ultimately would depend on their reception by the highest constitutional courts in the different Member States.

2.2.5. Conclusion

After studying the elements that were discussed above one can obviously conclude that the European Court of Justice has played a role of major importance in the process of "mutating" the European Community into something that might be considered a political society. The philosophical origin as we saw already before could be found in the ideas of John Locke according to who the political society must be able to protect the fundamental rights of individuals. In order to do that the best way possible it is necessary to have a common legislator and a common judge. Those two features guarantee the homogenous interpretation as well as enforcement of the law common to all. Competences and limits of these powers are to be determined by the constitution.

Constitutional elements occurring in the case law of the Court of Justice clearly reflect it's striving towards creating a constitution in its strong sense for the Community.

¹⁰⁹ Judgment of February 18, 1999 in Case 24833/94

¹¹⁰ J. Weiler, "The Constitution of Europe", p 24

A phrase used by the Court, namely “the new legal order”, could be understood as something close to a new political society. In that society rights of the individuals come to the surface and gain a totally different position than in an ordinary international organization. That kind of a new environment makes inevitable to conduct according to the principles that were created by the Court, the principles of direct effect, supremacy and that of implied powers.

Elements mentioned above constitute the means of achieving a higher goal, which is the welfare of European citizens and the protection of their fundamental rights. A consequence of that is that the rules of Community law must have binding effect in relation to both state power and other individuals. While creating these principles the Court has been in the position where it must seek support in legal sources that lie outside EC positive law¹¹¹. With the help of teleological method of interpretation the Court has succeeded in its task.

2.3. “Masters of the Treaties” vs. European Court of Justice, has the Court been “running wild”?

2.3.1. Introduction

“As for what is commonly called international law, because it lacks any sanction, they are unquestionably mere illusions even feebler than the law of nature. The latter at least speaks in the heart of individual men; whereas the decisions of international law, having no other guarantee than their usefulness to the person who submits to them, are only in so far as interest accords with them.”¹¹²

As we saw in the previous section of the thesis, the Court has made a great effort in introducing a new perspective to the Community and to the process of integration by constitutionalising the Treaty. Although these constitutionalising elements that were

¹¹¹ O. Zetterquist, A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community, p 372

¹¹² J.-J. Rousseau, “The State of War” in M.G.Forsyth, H.M.A.Keens-Soper and Savigear (eds), The Theory of International Relations: Selected texts from Gentili to Treitschke, London: George Allen&Unwin, 1970, p 175

studied above have emerged gradually during the years, the resistance in adopting them in reality has been of quite significance. That resistance has mainly come from the part of some Member States but it has gained some support also from numerous legal academics. When the Court's line of argument could be said to have found its roots in the ideas of John Locke, then the case of counter arguments turns its face more towards the perspective of Thomas Hobbes; particularly his theory of sovereignty, which was studied in the first part of the thesis. It seems quite clear why it has been like this, because the time when the Treaty of Rome was signed was the time of nation states in the Europe. Therefore the notion of sovereignty as such is still very deeply rooted in the minds of people even nowadays and it is most often used as an argument for supporting the ideas against an "ever closer union". The arguments put forward in the following section of the thesis rest on the understanding that the Community is based on the public international law and therefore derives its legitimacy from the constitutions of the Member States.

2.3.2. Sovereign Member States as "Masters of the Treaties"

It was seen in the previous part that according to some actors the Treaty has lost its character as a treaty and has been transformed into a constitution that lays the foundation to a new and independent political society, the members of which have individual rights independently of the constitutions of the respective states. The main point of disagreement seems to be the legal source of the Treaty. When the constitutionalist point of view argues that the Treaty must be interpreted under the constitutional law, the other side supports the original idea that the Treaty is an instrument of public international law and must therefore be interpreted according to that as well. That kind of an approach leaves the "ball" into the hands of the Member States who were the original signatories to the Treaty. And nothing can happen at the Community level if the Member States don't wish that to happen. In other words the Member States have been and will be the "masters of the Treaty". It also means that it is up to the Member States and not to the Community to guarantee the protection of the rights of the individuals. Therefore individuals are political subjects only in their capacity as belonging to a state. That is

because only states possess the necessary means of coercion to enforce the decrees of the legal system.

The supporters of the view that the Treaty is an instrument of public international law take their departure from the state sovereignty. It means that the Community's legal system derives its validity from the legal order of the Member States. The objective of the Community, as we already saw, according to the constitutional law view is the protection of the fundamental rights of the individuals who are direct legal persons of the legal system. Public international law point of view sees the objective on the other hand in the prosperity of the Member States through the peace, security and co-operation. In both approaches it is the individuals who ultimately benefit from it but in the latter case they do that indirectly through the state.

Following the logic it is obvious that the source of validity determines also whether the Community constitutes an independent legal system, that is to say a political society, or not. As was pointed out above, the origin of Community law is to be found in the Treaty. Its coming into existence, therefore, depended on international law. In another sense, it also depended on the national law of the Member States¹¹³. Community law could not function in the way it does unless it was recognized and applied by the courts of the Member States. In Hobbes it could be understood according to the principle of unity. According to that principle no inferior power can alter the sovereign's right to decide, which laws are enforceable in its territory. That is the case even if the sovereign's approval has been given *ex post factum*. Sovereign states created under the public international law an international organization, that of European Union. As long as they continue to act together, the Member States can do what they like with regard to the Community legal system. They created it and they can change it, or abolish it. In other words the Member States are the masters of the Treaty¹¹⁴.

Two very strong arguments in favor of the public international law perspective are that: 1) the EU is not a nation state and 2) that the EU does not derive its authority directly from its citizens but rather from its Member States¹¹⁵. Black's Law Dictionary defines a state as: "A people permanently occupying a fixed territory bound together by

¹¹³ T.C.Hartley, *Constitutional Problems of the European Union*, Hart Publishing, Oxford, 1999, p 140

¹¹⁴ *ibid*, p 148

common law habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other communities of the globe.”¹¹⁶ Without going into detailed analysis it is quite clear that the EU lacks some of those elements; for example such elements as “independent sovereignty”, “control over all persons and things” and “capability of making war and peace”. When it comes to deriving its authority it is necessary to bear in mind that the EU was founded in the form of international agreement between the nation states. Although the Court held in its Opinion No 1/91 that the Treaty is a “constitutional charter ... the subjects of which comprise not only Member States but also their nationals”¹¹⁷, it is, nevertheless, an undeniable fact that the constitutive authority for negotiating and adopting Treaty amendments remains with the Member States. As a further point it must be stressed also that the Treaties stipulate that: “the Union shall respect the national identities of its Member States”¹¹⁸; and “citizenship of the Union shall complement and not replace national citizenship”.¹¹⁹

2.3.3. The theory of *Kompetenz-Kompetenz*

If one was to agree that it is the Member States who are the “masters of the Treaty”, then a question arises why they have not done anything in order to cut down the “wild activity” of the Court. The truth is they have done that, although without major success in the sense that the Court’s most famous judgments have still been gradually and eventually accepted. Despite that, the counter attack from the part of national courts has gained some attention.

The strongest of the points raised within the line of arguments by the national legal authorities and academics as well is the theory of *Kompetenz-Kompetenz*. The theory is of a German origin and means jurisdiction to determine the extent of one’s own

¹¹⁵ J-C. Piris, Does the European Union have a Constitution? Does it need one?, p 566-569

¹¹⁶ Black’s Law Dictionary, St. Paul, MI : West Group, 2001

¹¹⁷ Opinion 1/91, (1991) ECR 6079 at 6102

¹¹⁸ Article 6(3) of the Treaty on European Union

¹¹⁹ Article 17(1) of the Treaty Establishing the European Community

jurisdiction¹²⁰. Basically it determines whether the state is sovereign or not. This theory could be divided as a judicial *Kompetenz-Kompetenz* and a legislative *Kompetenz-Kompetenz*. The latter provides a legislative institution a power to enact laws, which determine the extent of its powers. The first of them on the other hand gives a judicial institution power to decide on its own over the extent of its jurisdiction.

The question raised by the national courts is whether the European Court of Justice has judicial *Kompetenz-Kompetenz*. In other words whether it has the power to decide over the extent of its jurisdiction. It is of major importance because if it has it, it will indeed be the master of the national courts, and through them, master of the Member States¹²¹. In that case the ECJ would place itself above the sovereign and that leads the individuals back to the state of nature. In the words of constitutionalists, particularly in the words of John Locke, the ECJ would then be the common and impartial judge, which is a necessary precondition in order for the European Union to constitute a political society and in order for the citizens to have rights stemming from the common constitution. This something that should not happen according to the public international point of view.

2.3.3.1. The German Maastricht case¹²²

Since the theory of *Kompetenz-Kompetenz* is of a German origin, it is no surprise that it was in the German court where the issue was first raised. It is a decision of the German Constitutional Court (*Bundesverfassungsgericht*) in proceedings brought by a group of German citizens who claimed that it would be unconstitutional for Germany to ratify the Maastricht Agreement (Treaty on European Union). Particularly because with the Maastricht Agreement matters, which previously would have been decided by the German Parliament, a body elected by the German voters, would pass outside the control of the German electorate. It means that German citizens are indirectly represented in the

¹²⁰ J. Laffranque, Euroopa Liit. Euroopa Ühendus : institutsioonid ja õigus. Tallinn: Sisekaitseakadeemia, 1999

¹²¹ T.C.Hartley, Constitutional Problems of the European Union, p 153

taking decisions in which they used to be directly represented. Therefore it infringes the principle of democracy.

The German Constitutional Court argued in its judgment that the powers given to the Community were limited to those specified in the Treaty, which had been approved by the German Parliament. In other words, the Community legal system is applicable in Germany only because the German laws ratifying the Treaty say it is¹²³. According to the German court the Community as whole has no *Kompetenz-Kompetenz*, neither judicial nor legislative. It has no power to grant itself further powers¹²⁴. If it tried to assume further powers, anything done under those additional powers would be invalid in Germany. The *Bundesverfassungsgericht* said that it would itself determine whether any legal acts adopted by an institution of the Community went beyond the powers given to the Community¹²⁵.

2.3.3.2. The Danish Maastricht case¹²⁶

The Danish *Maastricht* decision in many ways covers the same ground as the German one. The case also began with a legal action by a group of citizens to challenge ratification of the Maastricht Treaty¹²⁷.

The Danish Supreme Court held that the Danish Constitution does not permit an international organization, such as the Community, to be given power to adopt legal acts or to make decisions that are contrary to the provisions of the Danish Constitution. In addition to that it stressed that an international organization cannot be permitted to determine for itself what its powers are¹²⁸. This is exactly the argument, which the Germans would call absence of *Kompetenz-Kompetenz*. With this stipulation the Danish Court like the German one left the “back door” open for the national courts to declare

¹²² *Brunner v. European Union Treaty*, *Bundesverfassungsgericht*, decision of 12 October 1993, (1994) 1 CMLR 57; (1994) 33 ILM 388; 89 BverfGE 155; 20 EuGRZ 429; (1993) NJW 3047

¹²³ This is a clear indication of influence from Hobbes and his theory of sovereignty.

¹²⁴ It means that no institution could grant itself or any other institution greater powers than given by the Treaty.

¹²⁵ Paragraph 49 of the judgment

¹²⁶ Danish Supreme Court, judgment of 6 April 1998, Case I 361/1997, *Carlsen v. Rasmussen*

¹²⁷ T.C.Hartley, *Constitutional Problems of the European Union*, p 158

¹²⁸ *ibid*, p 158

certain Community measures as well as the judgments of the ECJ inapplicable in that state. By doing that it strongly supports the idea that the EU is an international organization under public international law, thereby leaving the Member States as Sovereigns over their respective territory.

2.3.4. Conclusion

As we saw above there has been some heavy criticism towards the actions of the European Court of justice from the part of Member States, particularly the national courts. The cases that were mentioned show clearly that it is quite impossible for the Court of Justice to use its powers to advance the position of Community law to such an extent that the sovereignty of the Member States would be undermined. Those cases also mark that some of the Member States are very reluctant to agree to have a common constitution of the Union from where the citizens could derive their rights and also the protection of those rights. The “constitutionalisation” of the Treaty is a theory that comes both in a weak and a strong form¹²⁹. In its weak form it means no more than that the Treaty displays some of the characteristics of a constitution in the wide sense. In its strong form it means that the Treaty has become a constitution in the narrow sense. It has come about as a result of the judgments of the European Court of Justice criticized as going beyond the Treaty. It is obvious that the Member States are not very eager to follow the theory of “constitutionalisation” of the Treaty. It is quite certain when it comes to Germany and Denmark. Therefore, according to professor Hartley this theory suffers from a “reality deficit”. Is it still so will be discovered in a speculative method in the next section of the thesis, which studies the Future Convention and the ongoing debate about the constitution of the European Union. A special emphasis has been put on the question of individual rights within the constitutional framework.

2.4.Possible developments in the future

As we saw in the previous sections of the thesis there are different perspectives of approaching the nature of the Community and the source of its legitimacy. That determines whether the Community is based on the constitutional law or the public international law. It is of major importance also in the case of protecting the fundamental rights of the citizens of the Union. According to the first perspective it is the constitution of the Union that must assure the full protection of individual rights, the latter in the same time takes the constitutions of the respective Member States as the point of departure. Previous parts of the thesis showed that the discussion about determining the nature of the Community has been going on for quite some time now. This section in its turn tries to give an overview of possible solutions to that dual system. The overview mainly analyzes the achievements of the Future Convention and strives to find answers to the question about protection of fundamental rights of individuals in the future of the Union. It concerns particularly the Charter of Fundamental Rights (“the Charter”) in the framework of the Constitution of the Union and the possible membership of the Union in the Convention on Human Rights. The emphasis of the subject has chosen because as we saw in the previous parts of the thesis, the protection of fundamental rights of individuals is one of the main objectives of the Union. It also helps to identify the nature of the future Union, namely whether it is based on the constitutional law or the public international law.

2.4.1. The origin of the Charter of Fundamental Rights

The immediate background to the birth of the Charter was the decision by the EU Heads of State or Government at the Cologne European Council on the 3rd and 4th of June 1999 to establish such a Charter.¹²⁹ The European Council decided at that meeting to establish an *ad hoc* body to draw up the draft charter. The Cologne Council established further that this body should present a draft document in advance of the European Council in December 2000. It would then have to be considered whether and, if so, how

¹²⁹ *ibid*, p 180

¹³⁰ Conclusions of the European Council in Cologne, 3 and 4 June 1999, Annex IV

the Charter should be integrated into the treaties. After agreement of a final text of the Charter, the Presidents of the European Parliament, the Council of the European Union and the European Commission proclaimed the Charter on the 7th December 2000 on the fringes of the Nice European Council.¹³¹

An understanding of this broader history is vital to an appreciation of several of the subsequent issues. In brief, there has been an explosion of activity on human rights since the Second World War at the international, regional and national levels.¹³² As we earlier in the thesis, as long ago as the late 1960's, the absence of formally proclaimed human rights provisions in the Treaties establishing the European communities gave rise to considerable unease in several Member State constitutional courts. There have also been attempts from the part of Community institutions to propose accession of the Community to the Convention on Human Rights. It was argued that, as the Community competences grew, the need for the Community to accede to the Convention on Human Rights increased, to ensure the protection accorded by the Convention would not be decreased over time. However, in Opinion 2/94¹³³, the ECJ considered the issue of Community accession to the ECHR and decided that a Treaty amendment would be necessary before the Community could accede. The important role of fundamental rights within the EC legal order was accepted whilst refusing to allow the use of existing Treaty provisions to circumvent the need for a Treaty revision, thereby putting the emphasis on the need for a major political initiative.¹³⁴

Although the Charter was proclaimed already in 2000 it does not work yet in reality. That is why the Future Convention was in the Laeken European Council in December 2001 charged with a duty among other duties to give thought whether the Charter of Fundamental Rights should be included in the basic treaty and whether the European Community should accede to the European Convention on Human Rights.¹³⁵

¹³¹ OJ C 364/8, 18 December 2000

¹³² C. McCrudden, The Future of the EU Charter of Fundamental Rights, Jean Monnet Working Paper, Harvard Law School, No 10/01, 2001, p 2

¹³³ Opinion 2/94 (1996), ECR I-1759

¹³⁴ C. McCrudden, The Future of the EU Charter of Fundamental Rights, p 4

¹³⁵ "The Future of the European Union", Laeken Declaration, 15th December 2001, accessible at <http://ue.eu.int/Newsroom/LoadDoc.cfm?MAX?=1&DOC=!!!&BID=76&DID=68758&GRP=4056&LANG=1>.

Responsibility for this work was later given to the Convention Working Group II, which has recently come up with some important achievements.

2.4.2. Conclusions of the Working Group II of the Future Convention¹³⁶

The mandate of the Working Group (Group) was to prepare a political decision through examination of a series of specific questions relating to modalities and consequences of incorporating the Charter of Fundamental Rights into the basic treaty. Without prejudice to that political decision, and on the basis of the common understanding reached by the Group on all key issues related to the Charter, all members of the Group either supported strongly an incorporation of the Charter in a form, which would make the Charter legally binding and give it constitutional status, or would not rule out giving favorable consideration to such incorporation. Different forms exist to achieve that result, but in any event, a “building block” as central as fundamental rights should find its place in the Union’s constitutional framework.

Without making any final decisions on how to incorporate the Charter into the Treaty, the Working Group recommended some basic options for that: a) insertion of the text of the Charter articles at the beginning of the Constitutional Treaty in a Title or Chapter of that Treaty; b) insertion of an appropriate reference to the Charter in one article of the Constitutional Treaty; such a reference could be combined with annexing or attaching the Charter to the Constitutional Treaty. Although both these options could serve to make the Charter a legally binding text of constitutional status, the majority of the Group, in order to assure a greater legibility of the Constitutional Treaty, prefers the first option that was given. It must be stressed that in case of incorporating the Charter into the Treaty the competence of deciding over potential breaches of the Charter should, according to the Group, primarily lie on the national courts. The final report of that Group leaves

¹³⁶ The Final Report by the Working Group on the Charter can be found at the following address: <http://european-convention.eu.int>

unanswered the question about the relationship between the national courts and the European Court of Justice.

When it comes to the accession of the Union to the European Convention on Human Rights (ECHR), the Group stresses that the Future Convention is to decide only on whether to introduce into the new Treaty a constitutional authorization enabling the Union to accede to the ECHR. It would later be for the institutions of the Union, notably for the Council deciding by unanimity, to open negotiations for an accession treaty and set the concrete framework of those negotiations. Likewise, the decision on the appropriate timing for possible accession by the Union to the ECHR and to its various additional protocols should be left for the Council.

3. Conclusion

If one takes a glance at the original Treaty of Rome it soon becomes clear that although the founding fathers envisaged the development of an “ever closer union of the European peoples”, they did not anticipate the case-law-based constitutional system that has resulted from 40 years of practice by the European Court of Justice. As we saw during the discussion in the thesis, the EU legal system today contains several unwritten but fundamental constitutional principles that never appeared in the original treaty documents, nor in writing in anywhere else.

The purpose of the thesis was to show the possible philosophical roots and the path of development of the two perspectives, the first of which is the constitutional law approach and the second is the public international law one. The constant battle between these different ways of interpretations has lasted through the history of the Union and is now getting some new perspectives within the negotiations of the Future Convention.

Many of the legal scholars have stressed that the Treaty lacks constitutional character because there is no bill of rights in the Treaty. It seems that after the Future Convention this feature will be changed. That being said, one should keep on bearing in mind that there is still one thing that weakens the constitutional character of the Treaty even at the presence of the bill of rights. The fact remains that the Constitutional Treaty is not legitimized directly by the citizens of the Union by their consent through a referendum for example. In other words it means that no matter how many constitutional elements created by the Court, the Treaty on its basic features still remains an instrument of public international law, namely an international treaty, the amendment of which lies within the competencies of the respective Member States. It seems even after studying the reports of the Convention Working Groups that the EU is deemed to be something different; something between the political society, the democratic deficit of which is inherent, and international organization. That results mainly from the fact that the time of nation states

in Europe is not over and the understanding of the notion of sovereignty is still traditionally not flexible. Therefore in the end of the day it is still the Member States who are the Masters of the Treaty.

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